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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 17 2009

SRC 07 239 52124

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral associate at the University of California, Davis (UCD), working with micro-electro-mechanical systems (MEMS). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, as well as copies of old and new articles citing his published work.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on August 1, 2007. The petitioner indicated that he had published four scholarly articles, and identified nine citations to his work. We will revisit these citations in the context of the appeal.

The petitioner submitted several witness letters to describe his past and present work. Louisiana State University (LSU) Associate Professor [redacted] described the beneficiary's student work in technical detail and stated:

> [The petitioner] did both his MS and doctoral work under my supervision with the close collaboration of my colleague [redacted] . . . [The petitioner's] MS thesis defense was notable for the depth of his understanding of the technical issues and the clarity of his explanations. . . .
>
> [The petitioner] is a rare talent and an exceptional person. Through his thesis work he has made unique contributions to both microfabrication and gas chromatography.

Director of Microfabrication at LSU's Center for Advanced Microstructures and Devices (CAMD), stated:

> [The petitioner's] area of special interest is related to MEMS sensor development for a wide field of applications . . . utilizing the concept of gas chromatography (GC). Within his research he had to address many different research topics including MEMS process development and optimization, material characterization, system design, simulation and assembly, and system performance tests. He excelled in all aspects of this research helping to achieve a deeper understanding of the complexity of MEMS sensors for analytical applications through simulation and theoretical investigations, and moving our research results closer to a sensor product that will allow quasi in-situ monitoring of complex environmental situations. . . .
>
> [The petitioner] is a preeminent scholar in the design and fabrication of advanced GC sensor systems.

[redacted] of Gelsenkirchen University of Applied Sciences, Germany, stated:

> I have met [the petitioner] many times during various visits at LSU, and some of our students have worked with him during their stay at CAMD. [The petitioner] is currently working with [redacted] at CAMD, whom I know from his time at the University of Karlsruhe, Germany when he was a student.
>
> . . . [The petitioner] has generated excellent expertise in the field of MEMS development. I can testify from my personal knowledge of the work done by this group that his interdisciplinary expertise in integrating MEMS with analytical instrumentation is playing a key role in developing fast and small gas sensors. . . .
>
> [T]he results of [the petitioner's] PhD dissertation not only advance the state of the art of the subject and [are] academically highly stimulating, but will also play a major role in

> solving complex and difficult problems in microfluidics, MEMS system integration, and the development of analytical instrumentation.

In a letter dated June 4, 2007, [redacted] asserted that the petitioner's "research capabilities and his insights have been critical to our project's success to date." He also stated: "if we were to lose [the petitioner] from our research team, it would have devastating impact on our ability to timely and effectively achieve our goal of developing small, fast GC sensors for DoD [Department of Defense] and chemical manufacturing applications." The record shows that the petitioner's appointment at LSU expired on June 30, 2007, at which point the petitioner left LSU to begin working at UCD. Thus, the petitioner's departure from [redacted]'s research team was imminent for reasons apparently unrelated to the petitioner's immigration status.

In a May 31, 2007 letter, [redacted] of Sandia National Laboratories stated:

> I have known [the petitioner] for almost three years. We are currently collaborators . . . in basic research and development of a Micro Gas Analyzer . . . [for] the rapid and accurate detection and identification of hazardous chemicals, including chemical warfare agents. . . .
>
> [The petitioner] has obtained key results in measuring the performance characteristics of microfabricated gas chromatography columns. These results will significantly affect the choices regarding column geometries to be incorporated into future microscale gas chromatography systems.

The petitioner's collaboration with [redacted] appears to have ended when the petitioner left LSU a month after [redacted] wrote the above letter.

[redacted], writing on July 22, 2007, some three weeks after the beneficiary began working at UCD, stated:

> Once he joined my laboratory, [the petitioner] quickly became a critical member of my research team. . . . He is helping to make several of my sponsored programs a success, and I was not able to find any other technically qualified Ph.D.-level candidates who could fill this role in my group (U.S. citizen or foreign national) during the time that I was hiring for these projects:
>
> (1) clinical diagnostic work on non-invasive chemical sensors for breath analysis . . . ;
> (2) environmental detection of virus pathogens for defense applications . . . ;
> (3) novel techniques and technologies for surreptitious monitoring and identification of individuals who have been handling precursors to improvised explosive devices.

The petitioner asserted: "I have served as the judge of the work of others in the field." As evidence of this, the petitioner submitted copies of correspondence in which [redacted] asked for the petitioner's help in reviewing two manuscripts submitted for publication in *Analytical Chemistry*. The petitioner did not explain why these requests from a direct supervisor should be seen as a sign of wider recognition in his field. We note the petitioner's submission of "Ethical Guidelines to Publication of Chemical Research," published in *Analytical Chemistry* in 2007. Those guidelines state, on page 393, that "every scientist has an obligation to do a fair share of reviewing," in which case there is nothing remarkable about the petitioner's occasional participation in peer review. (Even then, it was [redacted] not the petitioner, who was invited to review the manuscripts; [redacted] then passed them on to the petitioner.)

On September 10, 2008, the director issued a request for evidence (RFE). The director instructed the petitioner to "establish . . . a past record of specific prior achievement that justifies projections of future benefit to the national interest." The director specifically requested evidence of independent citation of the petitioner's work by other researchers. In response, the petitioner described his current research:

> [W]e are targeting inducible volatile organic compound profile in citrus crops as a generalized strategy to build an early disease detection system that has a sensitive platform for the discovery and detection of these chemical compounds using chemometrics and bioinformatics, and the construction of adaptive network models to interpret and predict citrus pathogen/defense mechanisms. I am utilizing my expertise in chemical analysis specifically micro gas chromatography to build the next generation of sensors for on-field detection of plant volatiles in response to viruses and diseases.

This is the first mention of the petitioner's work with citrus crops. [redacted] July 22, 2007 letter referred to breath analysis, defense-related virus detection and explosive devices, but not citrus pathogens. This highlights a problem with basing a waiver claim on individual, short-term projects. Student work and postdoctoral training are, by nature, temporary, and the petitioner is moving from project to project as this training progresses. By the time USCIS received [redacted]s letter stating that the petitioner's departure from LSU would be "devastating," the petitioner had already left LSU, and by the time the petitioner responded to the RFE, less than 18 months after the petition's filing date, he had already begun a completely new project not mentioned in the initial submission. For this reason, we must judge the petitioner's overall impact and influence on his field, rather than attaching paramount importance to a single project that, for all we know, may have ended already.

Highlighting the shifting nature of his work, the petitioner submitted a letter from [redacted], who described a research proposal that "focuses on developing novel sensors for screening of precancerous colorectal polyps. . . . [The petitioner] has proposed a novel chemical sensor for in vivo localized and real time measurement of biomarkers on the colon."

In her second letter, [redacted] stated that the petitioner "has quickly become a critical member of my research team, and has already made substantial contributions to our studied." She stated that the petitioner "has accelerated the development of novel hybrid organometallic films for semiconductor

applications," which "has many important benefits over current practices . . . resulting in significant savings."

[redacted] of Microfabrication at the Berlin Electron Storage Ring Company for Synchrotron Radiation (BESSY, from its German acronym), stated: "I have worked to forge a close relationship between the microfabrication groups at BESSY and at" LSU's CAMD. [redacted] credited the petitioner with "outstanding research" with micro gas analyzers.

[redacted] for Environmental Sensors at Inficon, stated that "the micro chemical sensors developed by [the petitioner] can revolutionize the industry, which will have a significant impact on the US industries."

[redacted] of New York Medical College, who is also the Chief Executive Officer of Menssana Research, Inc., called the petitioner "one of the very few young scientists who are successfully merging engineering and clinical sciences."

The petitioner submitted an updated list of citations of his work. In addition to the citations claimed previously, the list identified five new articles, a doctoral thesis, an online database and a University of Colorado recommended reading list. One of the five new citations is a self-citation by the petitioner's LSU collaborators.

The director denied the petition on February 5, 2009, stating that the Google Scholar database (http://scholar.google.com) showed only one citation each for two of the petitioner's articles. The director concluded "the petitioner has offered no evidence showing that his publications record is noteworthy or that his work was heavily cited." The director found that the witness letters were not sufficient to show the petitioner's eligibility for the waiver.

On appeal, counsel states: "at the time of filing . . . , Petitioner's work had been cited nine (9) times by other Researchers. . . . These are all citations from *independent* researche[r]s, showing that Petitioner has had a discern[i]ble and significant impact beyond his own peers and collaborators" (counsel's emphasis). Counsel is correct that the petitioner had documented more than two citations of his work. The director erred by ignoring the petitioner's citation evidence and, instead, relying solely on a Google Scholar search outside the record of proceeding. (The record does not contain a printout from the director's search.)

At the same time, this error by the director is not necessarily an automatic basis for reversing the decision. Counsel's description of the evidence is inaccurate. While the petitioner claimed nine citations of his work, the record shows that only six of the citations appeared in published articles. Of those six published citations, one is a self-citation by the petitioner's collaborator, [redacted] Apart from the published citations, the remaining three claimed citations all appear in master's theses. All the authors of the three citing master's theses have also collaborated with the petitioner. The record, therefore, contradicts counsel's claim that the nine initial citations "are all citations from *independent* researchers"; nearly half the citations are from the petitioner's "own peers and collaborators." More

significantly, increasing the count from two to five independent citations does not overturn the director's decision. The director did not find that the petitioner was three citations short of eligibility.

Counsel also exaggerates when stating that the petitioner had produced "over 20 publications at the time of filing." The petitioner's own résumé at the time of filing listed only four published articles. The number reaches 20 only if we add the petitioner's 16 conference presentations. The petitioner has not established that such a presentation record is unusual in his field, or, for that matter, that quantity is a reliable measure of quality. (Some witnesses in this proceeding have submitted résumés 40 or more pages in length.) Another exaggeration in the record is when the petitioner attempted to attach special significance to his work as a "judge," when his own evidence indicates that peer review of manuscripts (the "judging" in question) is an "obligation" of "every scientist."

Counsel asserts that the petitioner has already established a "distinguished record of accomplishment." The record does show that the petitioner's witnesses have been impressed with the petitioner's abilities. We repeat, here, that exceptional ability is, by statute, not sufficient grounds for granting the waiver. A number of witnesses (for example, [redacted] emphasized the difficulty of locating qualified workers to fill job openings. The labor certification process is already in place to address worker shortages. *See Matter of New York State Dept. of Transportation* at 218. Therefore, the assertion that United States workers are unavailable is generally a poor argument for exempting the petitioner from that same labor certification process. With respect to the assertion that the petitioner is a vital part of his ongoing projects, his postdoctoral training is inherently temporary and he already holds the necessary nonimmigrant visa status for that training.

The petitioner has established that he is in the early stages of a promising career and has earned the respect of his peers. The available evidence, however, does not demonstrate that the petitioner stands out to an extent that would justify the special benefit of an exemption from the job offer requirement that normally applies to the immigrant classification the petitioner has chosen to seek.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.